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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966 7

No. ~~1032~~ 48

MINNIE E. NASH,

Petitioner,

v.

FLORIDA INDUSTRIAL COMMISSION,
THE STANLEY WORKS and
STANLEY BUILDING SPECIALTIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

Petitioner prays that a writ of certiorari issue to review the final judgment of the District Court of Appeal of Florida, Third District, entered in the above-entitled case on October 11, 1966.

CITATIONS TO OPINIONS BELOW

The decision of the Appeals Referee, Florida Industrial Commission, Unemployment Compensation Appeal

Tribunal is unreported, appears in the Record at pp. 30-34, and is printed in Appendix C hereto, *infra*. The decision of the Florida Industrial Commission, Unemployment Compensation Board of Review is unreported, appears in the Record at p. 40, and is printed in Appendix B hereto, *infra*.

The District Court of Appeal, Third District of Florida, did not render an opinion; its final judgment here involved denying Petition for a Writ of Certiorari is officially reported at 191 So.2d 99, appears in the Record at p. 54, and is printed in Appendix A hereto, *infra*.

JURISDICTION

The judgment of the District Court of Appeal of Florida, Third District, was entered on October 11, 1966, R. 54; Appendix A hereto, *infra*. An Order Extending Time to File Petition for Writ of Certiorari was entered by Mr. Justice Black on January 10, 1967, extending Petitioner's time for filing the present Petition to and including February 8, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) since a right, privilege and immunity was claimed under the Constitution and Statutes of the United States.

QUESTIONS PRESENTED

1. Whether, consistent with the privileges and immunities clause and supremacy clause of the United States Constitution, a state may abridge the privilege or immunity of a citizen of the United States to inform the United States government of a violation of its laws,

by depriving a citizen of unemployment compensation benefits solely upon the ground that the citizen has filed an unfair labor practice charge with the National Labor Relations Board against her employer?

2. Under Article VI, clause 2, and the 14th Amendment, section 1, United States Constitution, may a state disqualify a citizen of the United States from unemployment compensation benefits solely because that citizen has filed an unfair labor practice charge with the National Labor Relations Board under the National Labor Relations Act 29 U.S.C. 141, et seq., such disqualification to begin on the date the unfair labor practice charge is filed and to continue for so long as it remains pending before the National Labor Relations Board?

3. Where a strike ends, and a striking employee is reinstated to her employment and such employee is thereafter laid off by the employer for lack of work and is granted state unemployment benefits, and where thereafter the employee's union within six months after the lay-off files charges alleging that the lay-off was illegal and discriminatory under the National Labor Relations Act, may the state, under Article VI, clause 2, and the 14th Amendment, section 1, then disqualify the employee from unemployment benefits during the pendency of such charges before the National Labor Relations Board?

4. Whether the right to file charges with the National Labor Relations Board is protected from state abridgement by the privileges and immunities clause and supremacy clause, United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

U. S. Constitution, Amendment XIV, Section I:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes (1965) Section 443.06(4):

"443.06 Disqualification for benefits—An individual shall be disqualified for benefits:

. . . . .

(4) For any week with respect to which the commission finds that his total or partial unemployment is due to a labor dispute in active progress which exists at the factory, establishment or other premises at which he is or was last employed; provided, that this subsection shall not apply if it is shown to the satisfaction of the commission that:

(a) He is not participating in or financing, or directly interested in the labor dispute which is in active progress; provided, however, that the payment of regular union dues shall not be construed as financing a labor dispute within the meaning of this section; and

(b) He does not belong to a grade or class of workers of which immediately before the commencement of the labor dispute there were members employed at the premises at which the labor dispute occurs any of whom are participating in, or financing, or directly interested in the dispute; provided, that if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, or are conducted in separate departments of the same premises, each department shall, for the purpose of this subsection be deemed to be a separate factory, establishment or other premises.

. . . . ."

STATEMENT OF THE CASE

Petitioner Minnie E. Nash is today and has been at all times material to this case (when employed) an employee of the Respondent Stanley Building Specialties Company, a division of Respondent Stanley Works (hereinafter referred to as Stanley) in Miami, Florida. The stipulated facts and undisputed testimony reveal the following chronology:

Petitioner was originally employed by Stanley some time in 1961 or 1962 (R. 13). She was a permanent employee. At some time subsequent to her employment, Petitioner joined the United Steelworkers of America (hereinafter referred to as the union) which was the certified collective bargaining representative of Stanley's employees (R. 11).

On January 31, 1965, which was the expiration date of the collective bargaining agreement which had previously been in effect between Stanley and the union, the union took strike action against the employer (R. 11). Picket lines were established in which Petitioner participated, and Petitioner did not work for Stanley during the period of the continuation of the strike and picketing (R. 11, 13, 14). During the period of the strike Stanley continued operations.

On or about March 30, 1965, the union offered to return the striking workers to their jobs unconditionally, and on April 5, Stanley agreed to take some of the striking workers back unconditionally. Petitioner was among the workers accepted unconditionally for return (R. 11). On April 5, 1965, the picket lines were removed and the

employer began processing the returnees. Petitioner actually resumed her active permanent employment with Stanley on April 14, 1965 (R. 11, 14).

Petitioner was laid off from her permanent employment with the Respondent because of "slow production" on May 14, 1965 (R. 1, 12). On May 17, 1965, Petitioner applied for unemployment compensation benefits under Florida Statutes, Chapter 443, and began receiving benefits effective May 16, 1965, approximately three weeks later (R. 1, 17).

On June 17, 1965, Petitioner's union, the United Steelworkers of America, on Petitioner's behalf, filed unfair labor practice charges with the National Labor Relations Board, pursuant to 29 U.S.C. 160, alleging that Petitioner's layoff had been discriminatory and was motivated by bias engendered by Petitioner's previous union activities in violation of 29 U.S.C. 158(a)(1), and 158(a)(3). (R. 11, 13, 14).

Petitioner continued receiving unemployment compensation benefits until October 5, 1965, when she was returned to work voluntarily by Stanley (R. 15, 20).

In a Redeterminaiton rendered by a Claims Examiner on November 15, 1965, the Respondent, Florida Industrial Commission, ruled that Petitioner was disqualified under Florida Statute §443.06(4) from receipt of any benefits:

> " . . . beginning January 31, 1965, and for the duration of your unemployment which is due to

> a labor dispute at the factory or other premises of the Stanley Works." (R. 3)

The Claims Examiner relied upon Florida Statute §443.06(4), which provides, in pertinent part, that benefits may not be paid a claimant,

> "For any week with respect to which the Commission finds that his total or partial unemployment is *due to a labor dispute in active progress* which exists at the factory, establishment, or other premises at which he is or was last employed. . . ." (Emphasis added.)

Petitioner filed a timely appeal from the Claims Examiner's Redetermination (R. 4).

After due notice to all parties, a hearing was held before an Appeals Referee on December 22, 1965, in Miami, Florida, at which Petitioner, a representative of the employer, and a field deputy of the Respondent Florida Industrial Commission testified. Petitioner and Stanley were represented by counsel and Petitioner raised her claim of federal constitutional privileges and immunities as preventing the application of Florida Statute §443.06 (4) to her, in argument of counsel, at this earliest adversary administrative level (R. 14).

The Appeals Referee, in a decision rendered on January 14, 1965, affirmed in part and reversed in part the Redetermination of the Claims Examiner (R. 30). The Referee ruled that Petitioner was disqualified from receiving benefits for the period of her voluntary strike activities from January 31, 1965, until April 14, 1965.

This finding was mere surplusage for Petitioner had neither applied for nor received any benefits during that period.

The Referee then ruled that Petitioner was *eligible* for unemployment compensation benefits for the period May 16, 1965, through June 17, 1965, finding that her unemployment during this period was *not* due to a labor dispute in active progress under the terms of Florida Statute §443.06(4) (R. 31). However, the Referee went on to find that Petitioner *was disqualified* from receipt of any benefits for the period June 17, 1965-October 5, 1965, based upon the following reasoning:

> "The testimony presented in this instance shows that on June 17, 1965, appellant filed charges with the National Labor Relations Board against the employer because of her separation on May 16, 1965, seeking, among other things, reinstatement on her job and back pay for time which she had lost from work. It has further been shown that these charges were unresolved and pending when claimant was recalled to work by the employer, voluntarily, on October 5, 1965. These charges being filed and being unresolved and pending as of the date appellant returned to work constitute a labor dispute in active progress at the premises at which she was last employed between claimant and the employer. *Consequently, here it should be deemed that any unemployment appellant experienced during the period June 17, 1965, to October 5, 1965, is due to a labor dispute in active progress at the premises at which she was last employed and she par-*

ticipated in such dispute." (R. 33) (Emphasis added)

Petitioner timely filed an application for leave to appeal to the Unemployment Compensation Board of Review of the Florida Industrial Commission under Florida Statute §443.07(4)(4). (R. 35). Included in the grounds for appeal was Petitioner's federal constitutional claim (R. 36).

On February 16, 1966, a review hearing was held by the Unemployment Compensation Board of Review in Tallahassee, Florida, and on February 22, 1966, the Board of Review rendered its decision affirming the Appeals Referee without opinion. (R. 40)

Thereafter, Petitioner timely filed her petition for certiorari directed to the Florida Industrial Commission, in the District Court of Appeal of Florida, Third District, pursuant to Florida Statute §443.07(4)(3).

In that Court, the highest state court in which Petitioner could seek the enforcement of her federal constitutional rights,[1] Petitioner raised the issue here presented in the following manner:

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[1]The District Court of Appeal of Florida, expressly by Florida Statute Section 443.07(4)(e) has exclusive jurisdiction to entertain petitions for certiorari to review the determinations of the Respondent Florida Industrial Commission Unemployment Compensation Board of Review. Petitioner claimed or specially set up her privileges and immunities under the Fourteenth Amendment and Supremacy Clause, United States Constitution, in the manner above-quoted to that Court.

The District Court of Appeal entered a *per curiam* denial of Petitioner's petition for certiorari, thus precluding further State Court review under the pertinent provisions of the State Constitution and Florida Appellate Rules. Article V, Section 4, Florida Constitution; Florida Appellate Rule 2.1(b); *Armstrong v. City of Tampa*, 106 So.2d 407 (Fla. Sup.Ct.1958); *Miami Herald Publishing Co., v. Brauti-*

"POINTS INVOLVED"

"1. Whether, consistent with the privileges and immunities clause and supremacy clause of the United States Constitution, a state may abridge the privilege of a citizen of the United States to inform the United States government of a violation of its laws, by depriving a citizen of unemployment compensation benefits solely upon the ground that the citizen has so informed the government by filing an unfair labor practice charge against her employer?" Brief of Petitioner in Florida District Court of Appeal, Third District, p. 6..

The District Court of Appeal on October 11, 1966, denied the petition for a writ of certiorari without opinion. (R. 41)

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner relies upon the following reasons why the petition for writ of certiorari should be granted in this case:

Important and substantial issues of federal constitu-

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gam, 121 So.2d 431 (Fla. Sup.Ct.1960); 127 So.2d 718 (3rd D.C.A. Fla. 1961) *cert. denied*, (1962) 369 U.S. 821; *Page v. State*, 113 So.2d 557 (Fla. Sup.Ct.1959).

This state practice is identical to the situation in *Adderley v. Florida*, (1966) ——U.S.——, 87 S.Ct. 242, where petitioners claimed rights under the Fourteenth Amendment as precluding their conviction under a trespass statute, and the District Court of Appeal of Florida, First District, entered a *per curiam* affirmance of the convictions, from which denial a petition for certiorari was granted by this Court.

tional law are here presented, involving the relationship between the national labor policy as embodied in the National Labor Relations Act, 29 U.S.C. 141 et seq. and the State of Florida's policy of disqualifying from state unemployment benefits all persons who file unfair labor practice charges pursuant to the Federal Act, in the light of the controlling provisions of the Supremacy Clause and Fourteenth Amendment to the United States Constitution.

Petitioner submits that the State of Florida, in so implementing the provisions of its State Unemployment Compensation Act, Chapter 443, Florida Statutes 1965, particularly Section 443.06(4) thereof, has effectively abridged her privileges and immunities as a citizen of the United States, contrary to the Fourteenth Amendment and in conflict with controlling principles established by this Court.

The record here demonstrates in stark outline that Petitioner has been disqualified from receiving unemployment compensation benefits under Florida Statutes §443.06(4), for the sole reason that, subsequent to her unemployment, she informed the United States Government of a violation of its laws, i.e., filed unfair labor practice charges with the National Labor Relations Board.

The decision of the Appeals Referee, in allowing Petitioner's claim for benefits from the date of her layoff (May 16, 1965) to the date unfair labor practice charges were filed (June 17, 1965), then revoking benefits as of the date of filing charges, shows beyond any doubt that the sole reason for Petitioner's disqualification was the

filing and pendency of her charges with the National Labor Relations Board.[2]

The stipulated facts reveal that, before the NLRB and in the present case, the employer respondents have consistently taken the position that Petitioner's layoff on May 16, 1965, was based upon purely economic considerations (R. 12). There would be no question then that but for the filing of charges Petitioner would have been eligible for benefits for the full period of her unemployment. Such a *per se* disqualification cannot stand, consistent with Petitioner's federal constitutional rights.

The Privileges and Immunities Clause, contained in the Fourteenth Amendment to the United States Constitution, although little used in the great Constitutional controversies of the last century, maintains its potency in several clearly defined areas. Petitioner submits that the present case falls within one of these areas.

The Clause was early held to protect from state encroachment, those privileges and immunities of citizens of the United States " . . . which owe their existence to the Federal Government, its National character, its Constitution, or its laws." *Slaughter-House Cases* (1873) 83 U.S. 36, 79.

Among the rights subsequently enumerated within these narrowly definited limits is *the right to inform the*

[2]Another decision of the District Court of Appeal below, *Labinsky v. Florida Industrial Commission*, 167 So.2d 620 (Fla. 1964), demonstrates that where no unfair labor practice charges have been filed, an employee who has previously been disqualified from benefits under the "labor dispute" proviso, becomes qualified when he resumes permanent employment, as Petitioner did from April 14, 1965 to May 16, 1965.

United States authorities of violations of its laws. In Re Quarles, (1895) 158 U.S. 532.

In the *Quarles* case, *supra,* this Court held:

> "The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself of a national government, paramount and supreme within its sphere of action. *Logan v. United States,* 144 U.S. 294. Both are, within the concise definition of the Chief Justice in an earlier case, 'privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.' *Ex Parte Kemmler,* 136 U.S. 436, 448." 158 U.S. at 536.

The filing of an unfair labor practice charge with the National Labor Relations Board is nothing more nor less than informing an agency of the United States Government of a violation of federal law. The NLRB is particularly empowered to investigate and remedy these violations. *Labor Management Relations* Act, 29 U.S.C. §160-161.

When Petitioner, through her collective bargaining representative, filed these charges, she in her capacity as a citizen of the United States was exercising a right which owes its existence to federal law. The remedies sought

are uniquely within the province of the federal government's power to regulate interstate commerce. *NLRB v. Jones & Laughlin Steel Corp.* (1939) 301 U.S. 1.

As a direct result of exercising this constitutionally protected right, indeed, as the automatic result of the exercise of this right, Petitioner, under the State of Florida's view, thereupon became disqualified for benefits to which she unquestionably would otherwise have been entitled.

Clearly the state may not claim that unemployment compensation benefits are merely a "privilege" rather than a "right," and that the state may condition access to the "privilege" as it sees fit.[3] In *Sherbert v. Verner*, (1963) 374 U.S. 398, this Court laid to rest such contentions with regard to unemployment compensation benefits, in holding that constitutional protections may not ". . . be infringed by the denial of or placing of conditions upon a benefit or privilege. . . ." 374 U.S. at 404. (See also

[3]Respondent Employers urged such an "election" or "condition" theory upon the District Court of Appeal below contending that the State could, consistent with the Constitution " . . . . put petitioner to an election of available remedies and tribunals . . . ." Brief of Respondent Employer, p. 18.

A second ground urged upon the Court below was that petitioner's charges filed with the NLRB were not reports to the Government of a violation of the NLRA but merely ". . . an assertion that an employee, union or other party *thinks* an employer has violated the National Labor Relations Act. It is in no wise a report to the Government of a violation of said Act." Brief for Respondent Employers, p. 16 (emphasis in original). Respondent employers therefore urged that no protection should be accorded to such reports until the NLRB and an appropriate Circuit Court of Appeals determined that there had, in fact, been a violation of the NLRA. Petitioner submits that analogous reasoning would deprive an informant of the violation of any law of the United States of all privilege until the conviction and determination on appeal of the guilt of the violator. This is surely not what this Court held in *Quarles*.

footnote 6, page 404, where numerous cases are cited as ". . . examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity. . . .")

Nor can the State justify this substantial abridgement of Petitioner's constitutional privileges and immunities on the basis of any compelling State interest. The "labor dispute" disqualification proviso found in some form in all state unemployment compensation acts, is directed primarily to the *voluntary* character of unemployment resulting from a strike, and secondarily to the principle of neutrality of government in labor disputes (i.e., strikers or "locked-out" employees should not be "subsidized" with unemployment benefits.) See, e.g., Hughes, Principles Underlying Labor Dispute Disqualification (Federal Security Agency 1946); Lesser, Labor Disputes and Unemployment Compensation 55 Yale L.J. 167 (1945); Lewis, The Concept of "Labor Dispute" in State Unemployment Insurance Laws, 8 B.C. Ind. and Comm. L. Rev. 29 (1966).

That policy is not directed to the situation here presented where an employee is laid off, according to her employer for economic reasons, and she informs the United States Government of her belief that such lay off is in violation of the NLRA. Under either the employer's or employee's view, the unemployment is not voluntary nor is it the employee's "fault", and she has been deprived of benefits solely upon the basis of the exercise of a constitutionally protected privilege and immunity.

The coercive effect of such disqualification is readily

apparent. Laid-off or fired employees who believe that their employer has committed an unfair labor practice in violation of federal law, will hesitate or abandon the report of such violation where the mere filing of charges results in an automatic disqualification from unemployment benefits. The subsistence level of income provided unemployed workers by such benefits is often their sole means of support, and deprivation clearly works a substantial hardship upon them. All such employees in the State of Florida are subject to this summary disqualification.

The federal scheme established in the National Labor Relations Act is dependent upon the freedom of employees to exercise their constitutionally protected right, privilege and immunity of reporting violations of the Act by filing charges within the NLRB. Filing NLRA charges is simply not an activity equivalent to striking, or other concerted activities which do, or may, consistent with the Fourteenth Amendment, provide a *per se* ground for disqualification from unemployment compensation benefits.

Petitioner does not seek any "double" compensation should the National Labor Relations Board ultimately find the employer guilty of the charge and make a back pay award in her favor. This Court made clear in *National Labor Relations Board v. Gullett Gin Co.*, (1951) 340 U.S. 361 that a state may recoup unemployment compensation benefits paid during a period for which the NLRB subsequently awards back pay. It was there stated, "Recoupment in such situations is a matter between the State and the employees." 340 U.S. at 365, footnote 1.

Thus, there is clearly a way for the State and Federal policies and laws to be harmonized without abridging

the privileges and immunities of citizens of the United States.

Just as in *Sherbert v. Verner*, supra, where this Court struck down a State's unemployment compensation policy which infringed upon constitutionally protected activity, Petitioner seeks herein the protection of her federal constitutional privilege and immunity to advise the Government of the United States of violations of its laws.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition For A Writ Of Certiorari was mailed first class, postage prepaid to Patrick H. Mears, Esq., General Counsel, Caldwell Building, Tallahassee, Florida, and Lawrence Kanzer, Esq., Room 161, State Office Building, 1350 N. W. 12th Avenue, Miami, Florida, Attorneys for Respondent, Florida Industrial Commission, and to W. Reynolds Allen and Glenn L. Greene, Jr., Esqs., Fowler, White, Gillen, Humkey and Trenam, 501 City National Bank Building, Miami, Florida, Attorneys for Respondents, The Stanley Works and Stanley Building Specialties, this_____day of February, 1967.

_____

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